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In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH FEOLA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinions of the court of appeals (Pet. Apps. A and B) are reported at 486 F.2d 1339.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1973 (Pet. App. C). On December 11, 1973, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and

including January 18, 1974. The petition was filed on that date and was granted April 15, 1974 (A. 47). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to violate a federal law, it is necessary to prove the defendant's knowledge of the jurisdictional element, when such knowledge need not be shown in a prosecution for the underlying substantive offense.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 111 provides in part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

* * * * *

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, respondent and three co-defendants were convicted of assaulting federal narcotics officers while the officers were engaged in the performance of their official duties, in violation of 18 U.S.C. 111, and of conspiring to commit that offense, in violation of 18 U.S.C. 371.[1] Respondent was sentenced to imprisonment for one to four years on the conspiracy count, to be followed by three years' probation on the substantive count; he was also fined $3,000 on the substantive count. The court below initially reversed respondent's convictions on both counts (Pet. App. A), but upon rehearing reinstated his conviction on the substantive count (Pet. App. B).[2]

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[1] Respondent's three co-defendants were Enriquito Alsondo, Henry Rosa, and Michael Farr. Alsondo was also convicted of carrying a deadly weapon during the commission of a felony, in violation of 18 U.S.C. 924(c)(2).

[2] While the court below also reversed the conspiracy convictions of respondent's three co-defendants, we did not petition for a writ of certiorari in those cases because of the concurrent sentences involved (see Pet. 3, n. 2). Co-defendant Farr's petition to review his conviction on the substantive count is pending before the Court, *Farr* v. *United States*, No. 73-953.

1. On August 21, 1972, Jeffrey Hall, an undercover agent for the Bureau of Narcotics and Dangerous Drugs, was introduced to respondent's co-defendant Michael Farr through an informant. At that meeting, Farr agreed to provide agent Hall with a kilogram of heroin, to be supplied by respondent, for a price of $30,000 (A. 4-5). Ten days later, Hall, accompanied by undercover narcotics agent Lightcap and the informant, met Farr and Henry Rosa in front of a Manhattan apartment, where Rosa told Hall that they were prepared to sell half a kilogram of heroin for $17,000. Rosa asked to see Hall's money, and Hall showed him a "flashroll" of money. The group then proceeded to another Manhattan apartment, where respondent was purportedly waiting with the heroin. Enroute, Rosa told agent Hall that he was a bodyguard for the "big man," and was along to make sure that no guns were involved (A. 6-8, 17-19). Rosa also asked agent Lightcap if he was carrying a gun; Lightcap replied that he was not, although he did in fact have a gun in his waistband (A. 19-20).

Enriquito Alsondo admitted the group into the apartment and directed agent Hall to the bedroom where, he said, heroin was located. After handing the roll of money to agent Lightcap, agent Hall proceeded into the bedroom with Alsondo, Farr, and Rosa; he there observed an open attache case containing white powder, which Alsondo said was the heroin, but which was subsequently identified as a

form of sugar (A. 9-10, 21). Rosa and Farr then left the bedroom, and, as Alsondo was walking out of the room, agent Hall opened the door of a bedroom closet and observed a man on the floor, bound and gagged.[3] Agent Hall thereupon drew his gun and went out of the bedroom into a hallway where he observed Alsondo drawing a revolver from the back of his waistband as he approached agent Lightcap. Hall shouted a warning to Lightcap and also called out that they were federal agents. The two agents then forcibly subdued Alsondo and took the pistol from him, after which Hall handcuffed him (A. 11-12, 16, 22-23). Agent Lightcap then rushed to the living room area where he encountered Rosa, who attempted to shove Lightcap out of his way in an attempt to flee. Lightcap subdued Rosa and placed him under arrest; he then proceeded to the kitchen, where he found Farr, crouched in a corner with his hands over his head (A. 23-24). A search of the apartment revealed respondent concealed in a closet (A. 15, 25-26, 41).

At the time they arrested respondent, the agents seized an address book from him which contained the telephone numbers of Alsondo, Farr, and the Manhattan apartment in which the above described events occurred (A. 26-27, 29-37). Following his arrest, respondent told an Assistant United States Attorney that he had nothing to do with the sale of narcotics,

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[3] The man was subsequently identified as the tenant of the apartment (A. 15).

proclaiming, "[T]he stuff you seized is sugar" (A. 28).

Respondent testified in his own behalf. He acknowledged being at the apartment at the time of these events, but denied participating in the scheme to assault or rob the narcotics agents (A. 37-41).

At the close of the evidence, the conspiracy count was submitted to the jury on the theory that an agreement among the defendants could be inferred, which encompassed a plan either to defraud the agents by selling sugar for $17,000, or to assault and rob the agents should the fraud be discovered (A. 43-44).[4] The court also charged the jury with regard to the conspiracy count and the substantive count, without objection from defense counsel, that the government did not have to prove that the defendants knew that the victims of their assault were federal officers (A. 43, 46).

2. The court of appeals reversed the conviction on the conspiracy count on grounds not urged by respondent. It ruled that although knowledge that the victim of an assault is a federal officer was not essential for conviction of a substantive charge under 18 U.S.C. 111, such knowledge was required to support a conviction for conspiring to assault a federal officer. In reaching that conclusion, the court followed the 1941 opinion of Judge Learned Hand in *United States* v. *Crimmins*, 123 F.2d 271, in which

[4] The court instructed the jury that a conspiracy to *rob* the agents would also include a conspiracy to assault, since assault is an element of robbery (A. 43).

the Second Circuit had held that even though a defendant could be guilty of causing the interstate transportation of stolen securities without knowledge of their interstate transportation, such knowledge was required to support a conviction for *conspiring* to transport stolen securities in interstate commerce. The court recognized that *Crimmins* has been an object of criticism (Pet. App. 22), but "somewhat reluctantly" accepted it as "controlling precedent" (Pet. App. 24).[5]

SUMMARY OF ARGUMENT

There should be no difference in the quantum of knowledge required to establish perpetration of a substantive offense and to show a conspiracy. Thus

[5] In its first opinion, the court below also reversed respondent's substantive conviction under Section 111. Because respondent had not personally participated in the assault upon the agents, the court reasoned that his liability rested solely upon the principle that a conspirator is liable for the acts of his co-conspirators done in furtherance of the illicit plan. See *Pinkerton* v. *United States*, 328 U.S. 640, 647. A "*Pinkerton* instruction" had been given the jury. Since the court deemed the conspiracy conviction to be invalid, it held that the substantive conviction based upon the conspiracy charge similarly had to fall (Pet. App. 26). On reconsideration of this issue on rehearing, the substantive assault conviction of respondent was affirmed (Pet. App. B). The court noted in its second opinion that although respondent could not be guilty of a federal conspiracy to assault federal officers, he was nonetheless guilty as a joint criminal venturer of assaulting certain individuals, and thus, being legally responsible for the acts of his co-venturers, he was guilty of the substantive assault upon federal officers, which requires no specific knowledge of the victims' status.

when knowledge of a federal jurisdictional element need not be shown in a prosecution for a substantive offense, neither should such knowledge be required to make out a conspiracy to commit that offense.

The federal courts of appeals have uniformly recognized that, in a prosecution for assaulting a federal officer under 18 U.S.C. 111, the prosecution is not required to prove that the defendant knew that his victim was a federal officer. These holdings are consistent with decisions under numerous other federal statutes holding that, when the statute is silent as to whether a defendant need know a federal jurisdictional element, proof of such knowledge is not required.

Since the underlying statute involved here does not require a showing of knowledge of the victim's federal status, such knowledge should not be required to establish a conspiracy to commit that offense. The notion that such knowledge is required stems from the 1941 decision in *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2). There Judge Learned Hand ruled that, in a prosecution for conspiracy to transport stolen bonds in interstate commerce, knowledge of the interstate transportation must be shown, even though such knowledge might not be required in a prosecution for the underlying substantive offense. Judge Hand rested his conclusion on his now famous traffic light analogy, which we set out below (*infra*, p. 17). As we demonstrate, that analogy fails because it substitutes for ignorance of the federal jurisdictional element (which is all that was unknown to

Crimmins), ignorance of the very object of the conspiracy (in his analogy, ignorance of the existence of a traffic light).

That knowledge of a federal jurisdictional element is not required in a conspiracy prosecution is established by *United States* v. *Freed*, 401 U.S. 601, in which this Court upheld an indictment for conspiracy to possess unregistered hand grenades which did not allege knowledge of the federal registration requirements.

In fact, requiring knowledge of a jurisdictional element is inconsistent with this Court's view of the law of conspiracy. As the Court said in *Blumenthal* v. *United States*, 332 U.S. 539, 557, a conspiracy may be proved by showing an understanding of the general plan, "without requiring evidence of knowledge of all its details * * *."

The conclusion that knowledge of a jurisdictional element is not required is buttressed by decisions under other federal statutes which have held that, if such knowledge is not required to prove a substantive offense, it need not be shown in a conspiracy prosecution.

ARGUMENT

IN A PROSECUTION FOR CONSPIRACY TO VIOLATE A FEDERAL LAW, IT IS NOT NECESSARY TO PROVE A DEFENDANT'S KNOWLEDGE OF THE FEDERAL JURISDICTIONAL ELEMENT WHEN SUCH KNOWLEDGE NEED NOT BE SHOWN IN A PROSECUTION FOR THE UNDERLYING SUBSTANTIVE OFFENSE.

1. Our basic submission is that there should be symmetry between the law governing proof of sub-

stantive offenses and the law of conspiracy. Whatever state of knowledge must be proved to establish perpetration of the substantive offense, proof of the same state of knowledge, together with proof of an agreement to do acts constituting the substantive offense and an overt act in furtherance of that agreement, should suffice in a conspiracy prosecution. Thus, when knowledge of a federal jurisdictional element need not be shown in a prosecution for a substantive offense, neither should proof of such knowledge be required in a prosecution for conspiracy to commit that offense. The Ninth Circuit put the point well in *United States* v. *Roselli*, 432 F. 2d 879, 891-892:

> The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden result. There is no apparent reason for requiring not only proof of a concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense. Such knowledge is as irrelevant to the purposes of the general conspiracy statute as it is to the purposes of the substantive statutes. [Footnote omitted.]

The federal courts of appeals have uniformly recognized that, in a prosecution for assaulting a federal officer under 18 U.S.C. 111, the government is not required to prove that the defendant knew that the victim of his assault was a federal officer. See *United States* v. *Perkins*, 488 F. 2d 652 (C.A. 1);[6] *United States* v. *Ulan*, 421 F. 2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F. 2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F. 2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F. 2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F. 2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Ganter*, 436 F. 2d 364 (C.A. 7); *United States* v. *Leach*, 429 F. 2d 956 (C.A. 8) (dictum), certiorari denied, 402 U.S. 986; *United States* v. *Kartman*, 417 F. 2d 893 (C.A. 9).[7]

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[6] As pointed out in *Perkins*, there are situations in which the defendant's lack of knowledge of a federal official's status may be relevant, such as when the defendant believes that he is acting in lawful defense of his person or property and in so doing commits one of the acts enumerated in 18 U.S.C. 111. However, such a person's acts are not motivated by a criminal intent and are therefore clearly distinguishable from respondent's acts. Respondent, of course, did not claim justifiable self-defense.

[7] The conclusion that Section 111 does not require a showing of knowledge of the victim's official status is amply supported by the statute's wording, its manifest purpose, and its legislative history. As to the wording, the Second Circuit observed in *United States* v. *Lombardozzi*, 335 F. 2d 414, 416, certiorari denied, 379 U.S. 914:

> Many statutes creating crimes contain such requirements as "knowingly," "with knowledge," "intentionally," and "with intent." No such prerequisite has been written by Congress into section 111 although it could easily have made knowledge an essential ingredient. * * * The courts should not by judicial legislation change the stat-

ute by adding, in effect, the words "with knowledge that such person is a federal officer."

See also *Bennett* v. *United States*, 285 F. 2d 567 (C.A. 5), certiorari denied, 366 U.S. 911; *McNabb* v. *United States*, 123 F. 2d 848, 855 (C.A. 6), reversed on other grounds, 318 U.S. 332, certiorari denied after retrial, 323 U.S. 771.

Courts have further seen the elimination of the requirement of knowledge of the victim's status as consistent with the statute's underlying purpose, which is merely to provide a federal forum for the prosecution of assaults when they are made on federal officers. As the court observed in *Kartman*, *supra*, 417 F. 2d at 895:

> This interpretation of the forcible assault prohibition in section 111 as requiring only mens rea, and not also specific knowledge of the victim's official status, comports with the legislative purpose, which was simply to provide a federal forum when the enumerated offenses were committed against federal officers engaged in the performance of federal duties.

See also *United States* v. *Lombardozzi*, *supra*, 335 F. 2d at 416; *United States* v. *Goodwin*, *supra*, 440 F. 2d at 1155. But see *United States* v. *Fernandez*, C.A. 9, No. 72-2088, decided May 13, 1974 (Hufstedler, J., concurring), petition for writ of certiorari pending, No. 73-6868.

This view of the statute's purpose is confirmed by the central item of legislative history of the predecessor of 18 U.S.C. 111, a letter dated January 3, 1934, from Attorney General Cummings to the Chairman of the Senate Committee on the Judiciary. In that letter the Attorney General pointed out that "[t]he Federal Government should not be compelled to rely upon the courts of the States, however respectable and well disposed, for the protection of its investigative and law-enforcement personnel * * *." S. Rep. No. 535, 73d Cong., 2d Sess., p. 2. See also H. Rep. No. 1455, 73d Cong., 2d Sess.; 78 Cong. Rec. 8126-8127.

Finally, the conclusion that knowledge of the victim's federal status is not required under Section 111 is supported by the *Final Report of The National Commission on Reform of Federal Criminal Laws* (1971). Sections 1611 and 1612 encompass the offenses of simple assault and aggravated assault,

These rulings are consistent with similar rulings with respect to numerous other federal statutes. As in this case, the courts of appeals have uniformly held that where the statute in question is silent as to the requirement of a defendant's knowledge of a jurisdictional element, proof of such knowledge is not an element of the government's case in a prosecution of the substantive offense.[8] In a case involving a

and the fact that the victim is a federal officer is simply the "jurisdictional basis" which confers federal jurisdiction over the crime. See Sections 201(c), 1611(3), and 1612(2) of the *Final Report*. Section 204 of the *Final Report* specifically states that a defendant's knowledge of such "jurisdictional basis" is not required for prosecution under federal statutes, unless specifically provided in the statutes.

[8] The following are examples of such prosecutions arising under statutes requiring the presence of an interstate commerce or federal property nexus:

> 18 U.S.C. 2312 (interstate transportation of a stolen vehicle knowing it to be stolen): Knowledge by a defendant that he crossed state lines is not necessary. *Bibbins* v. *United States*, 400 F.2d 544 (C.A. 9).
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> 18 U.S.C. 2313 (receiving stolen vehicle moving in interstate commerce knowing it to have been stolen): Proof of knowledge that the vehicle has moved across state lines is not necessary. *Overton* v. *United States*, 405 F. 2d 168 (C.A. 5); *Pilgrim* v. *United States*, 266 F. 2d 486 (C.A. 5); *Brubaker* v. *United States*, 183 F. 2d 894 (C.A. 6); *United States* v. *Hamilton*, 456 F. 2d 171 (C.A. 3), certiorari denied, 406 U.S. 947.
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> 18 U.S.C. 2314 (interstate transportation of stolen goods knowing them to be stolen): Knowledge that the goods crossed state lines is unnecessary. *United States* v. *Kierschke*, 315 F. 2d 315 (C.A. 6); *United States* v. *White*, 451 F. 2d 559 (C.A. 6), certiorari denied, 405 U.S. 1071; *United States* v. *Mingoia*, 424 F. 2d 710 (C.A. 2);

United States v. *Strauss*, 443 F. 2d 986 (C.A. 1), certiorari denied, 404 U.S. 851; *United States* v. *Masters*, 456 F. 2d 1060 (C.A. 9); see *United States* v. *Tannuzzo*, 174 F. 2d 177 (C.A. 2), certiorari denied, 338 U.S. 815 (predecessor statute).

18 U.S.C. 2315 (receiving goods moving as part of interstate commerce knowing them to be stolen): Knowledge that the goods were moving in interstate commerce is unnecessary. *Pugliano* v. *United States*, 348 F. 2d 902 (C.A. 1), certiorari denied, 382 U.S. 939; *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *Corey* v. *United States*, 305 F. 2d 232 (C.A. 9), certiorari denied, 371 U.S. 956.

18 U.S.C. 2113(c) (receiving money taken from a federally insured bank): Knowledge that the money was from a federally insured bank is unnecessary. *Nelson* v. *United States*, 415 F. 2d 483 (C.A. 5), certiorari denied, 396 U.S. 1060.

18 U.S.C. 641 (theft and receipt of property of the United States): Knowledge that property knowingly converted belongs to the government is unnecessary. *United States* v. *Howey*, 427 F. 2d 1017 (C.A. 9); *United States* v. *Boyd*, 446 F. 2d 1267, 1274 (C.A. 5); cf. *Findley* v. *United States*, 362 F. 2d 921 (C.A. 10).

18 U.S.C. 659 (possession or receipt of goods stolen from an interstate shipment): Knowledge that goods were stolen specifically from interstate shipment is unnecessary. *United States* v. *Allegretti*, 340 F. 2d 243 (C.A. 7), certiorari denied, 381 U.S. 911; *United States* v. *Vilhotti*, 452 F. 2d 1186 (C.A. 2), certiorari denied, 406 U.S. 947.

18 U.S.C. 1952 (travel in or use of facilities of interstate commerce to facilitate an unlawful activity): Knowledge that interstate facilities were used is unnecessary. *United States* v. *Bash*, 258 F. Supp. 807 (N.D. Ind.), affirmed *sub nom. United States* v. *Miller*, 379 F. 2d 483, 487 (C.A. 7), certiorari denied, 389 U.S. 930; *United States* v. *Roselli*, 432 F. 2d 879 (C.A. 9), certiorari denied, 401 U.S. 924; *United States* v. *Hanon*, 428 F. 2d 101 (C.A. 8), certiorari denied, 402 U.S. 952.

prosecution for use of an interstate wire to execute a fraudulent scheme in violation of 18 U.S.C. 1343, the Second Circuit stated the reasoning that is generally followed concerning a defendant's knowledge of the federal jurisdictional element:

> The statute does not condition guilt upon knowledge that interstate communication is used. The use of interstate communication is logically no part of the crime itself. It is included in the statute merely as a ground for federal jurisdiction. The essence of the crime is the fraudulent scheme itself. Nothing is added to the guilt of the violator of the statute by reason of his having used an interstate telephone to further his scheme. There is consequently no reason at all why guilt under the statute should hinge upon knowledge that interstate communication is used. If the wire employed is an interstate wire the requirements for federal jurisdiction are satisfied. It is wholly irrelevant to any purpose of the statute that the perpetrator of the fraud knows about the use of interstate communication. [*United States* v. *Blassingame*, 427 F.2d 329, 330, certiorari denied, 402 U.S. 945.]

In short, the essence of the acts prohibited by the various statutes lies in the elements of robbery, theft, knowing possession of stolen property, etc.; nothing is added to the defendant's criminality by the mere fact that an act is involved which brings the crime within the jurisdiction of the federal government.

Since the underlying statute involved in the instant case, 18 U.S.C. 111, does not require a showing of knowledge of the victim's federal status, such knowledge should not, under the logically sound principle of symmetry, be required to establish a conspiracy to violate Section 111 by assaulting individuals who in fact are federal officers engaged in the performance of their duties.

2. The court of appeals recognized that the government need not prove, in a prosecution under 18 U.S.C. 111, that the defendant *knew* the victim of the assault to be a federal officer. Nevertheless the court held that such knowledge must be shown in a prosecution under 18 U.S.C. 371 for conspiracy to violate Section 111. The court reached this anomalous conclusion because it accepted *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2), as "controlling precedent" (Pet. App. 24).

Crimmins was a prosecution for conspiracy to transport stolen securities in interstate commerce under the predecessor statute to 18 U.S.C. 2314. Crimmins, a lawyer in Syracuse, received and disposed of stolen bonds from a confederate in New York City. The evidence showed that "some of * * * [the bonds] were stolen in other states [than New York]" and that Crimmins knew the bonds were stolen and had agreed to and did receive them (123 F. 2d at 272). However, the proof did not show that Crimmins "knew the place of any of the thefts" (*ibid.*). While Judge Learned Hand assumed that the evidence would support a conviction of the underlying substantive offense,[9] he nevertheless ruled that the *conspiracy* prosecution of Crimmins must fail because the evidence did not show that he *knew* of the bonds' interstate transportation.[10]

Judge Hand supported his conclusion principally by reference to the now famous "traffic light" analogy (123 F. 2d at 273):

> While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past such a light, for one cannot agree to run past a light unless one supposes that there is a light to run past.

Judge Hand argued that this analogy showed that to allow a conviction without proof of the conspirator's knowledge of the jurisdictional element would enlarge the scope of the conspiracy "beyond the reasonable intendment of the common understanding" of the conspirators. *Id.* at 273.

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[9] Courts have since held that proof of knowledge of the interstate transportation is not necessary. See note 8, *supra*.

[10] The rule espoused by the Second Circuit in this case has drawn criticism from commentators. See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 937-939 (1959); *National Commission on Reform of Federal Criminal Laws, Working Papers* 388-389 (1970). Likewise, the *Final Report of the National Commission on Reform of Federal Criminal Laws* (1971) has explicitly disavowed the notion that a conspirator must have knowledge of the jurisdictional element of an offense. See Sections 203, 204, and 1004 of the *Final Report*. See also A.L.I., *Model Penal Code*, Sec. 5.03, Comment at 112 (Tentative Draft No. 10, 1960) for a similar view.

The traffic light analogy in *Crimmins* is inapposite and misleading. It merely proves the impossibility of a conspiracy without an object, which is to say, that men cannot reach an agreement with no subject matter to agree about. That tautology fails to demonstrate that men may not conspire when they have an object in mind but are unaware of a fact necessary to give a particular court jurisdiction over their crime. In the present case, respondent conspired to assault particular men. The conspiracy had, therefore, a definite object. Moreover, the act agreed upon was obviously criminal. The only thing respondent did not know was that the men were federal officers so that the crime would be charged under a certain federal law rather than under state law.

The fallacy of the *Crimmins* traffic-light analogy in this context may be seen by recasting it to state ignorance of a jurisdictional element, which is all that is involved here, rather than ignorance of the object of the conspiracy. Thus:

> While one may be guilty of a federal offense for running past a traffic light on a federal reservation in ignorance of the fact that it stands on federal land, one cannot be guilty of a federal offense for conspiring to run past the light unless one supposes it to be on a federal reservation.

This substitution of ignorance of a jurisdictional element for ignorance of the object of the crime or conspiracy shows that the *Crimmins* analogy is inapplicable here. Applied to a jurisdictional element, the formulation makes no sense. When the object and

the criminality of both the act and the conspiracy are known, advance knowledge of which code provision applies and which government will apply the sanction are irrelevant.[11]

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[11] Another way of analyzing the vice of Judge Hand's analogy is to note that it is predicated upon a strict liability offense, whereas neither the crime being considered in *Crimmins* nor the assault here is that kind of offense. Strict liability offenses may, in fact, represent a singular exception to the general principle for which we here contend of symmetry between the knowledge requirements for substantive offenses and for related conspiracy charges (in part, as indicated in the text, because of the impossibility of postulating the conspiratorial agreement without an object). They do not, however, provide a meaningful analogy for consideration of conspiracies to commit other types of offenses.

In the case of strict liability offenses (*e.g.*, certain traffic violations, manufacture of adulterated or misbranded drugs), the law makes individuals engaged in certain hazardous occupations (*e.g.*, driving, drug manufacturing) do so at their own peril and permits imposition of criminal sanctions upon those who violate the law's standards, even if they are wholly ignorant of the duty imposed by the law or of the operative facts. See, *e.g.*, *United States* v. *Dotterweich*, 320 U.S. 277; see also Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933). In such circumstances, the actual performance of the prohibited act is thought to be of such harm to society as to warrant punishment regardless of the actor's state of knowledge. Where, however, there is merely an unfulfilled agreement to do an act (*e.g.*, driving a car or manufacturing drugs), there is no assurance that a crime will actually occur. For a crime to occur, some subsequent intervening event must take place: *e.g.*, the car must turn out to be unlicensed or the drugs adulterated. In the context of strict liability offenses, then, the agreement to do an act that later turns out to be unlawful may itself be entirely innocent.

But the crimes involved in *Crimmins* and in this case were not of a strict liability character. They were the common offenses of receiving stolen property and assault. *Mens rea*, the criminal intent, was shown when it was proved that

In short, the traffic light analogy simply does not support the holding that a conspiracy must include *knowledge* (as distinguished from factual existence) of every element of the substantive crime, even though such knowledge is not required for commission of the substantive crime itself. In fact, this Court has rejected that principle in *United States* v. *Freed*, 401 U.S. 601, 607-610. In *Freed* the defendants were charged with possession and conspiracy to possess hand grenades that had not been registered in the National Firearms Registration and Transfer Record as required by 26 U.S.C. 5861(d). The district court dismissed the indictment for failure to allege that the defendants knew that the hand grenades were in fact unregistered. This Court reversed, holding that knowledge that the hand grenades were unregistered (as distinct from proof that they were in fact unregistered) was not an element of the substantive offense or of the conspiracy to commit it. The requisite knowledge for the substantive offense and the conspiracy were held to be the same.

Interestingly, *Freed* dealt with a strict liability statute, "a regulatory measure in the interest of the public safety" (401 U.S. at 609), which is the home ground of Judge Hand's traffic light analogy (see

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Crimmins *knew* the bonds were stolen and that respondent and his co-defendants *intentionally* assaulted their victims. When crimes of this sort are substituted in Judge Hand's analogy, it becomes meaningless, because one cannot deal in stolen property "of whose existence one is ignorant" or commit an assault unknowingly.

note 11, *supra*). And even in the context of such a statute, the Court unanimously upheld the propriety of punishment for an agreement to do an act without proof that the defendant knew the act was prohibited. Thus, even in context of certain kinds of strict liability statutes, *Freed* establishes that the *Crimmins* analysis of conspiracy law is erroneous.

The Court in *Freed* doubted, however, that one could possess hand grenades without knowing that it was wrongful, even if one did not know of the existence of the federal jurisdictional element (in that case, the federal registration requirement). The Court said (401 U.S. at 609, n. 14):

> We need not decide whether a criminal conspiracy to do an act "innocent in itself" and not known by the alleged conspirators to be prohibited must be actuated by some corrupt motive other than the intention to do the act which is prohibited and which is the object of the conspiracy. An agreement to acquire hand grenades is hardly an agreement innocent in itself. Therefore what we have said of the substantive offense satisfies on these special facts the requirements for a conspiracy. * * *

So here, an agreement to commit an assault "is hardly an agreement innocent in itself," even if the conspirators did not know that the intended victims were federal officers. Therefore, proof of the elements "of the substantive offense satisfies * * * the requirements for a conspiracy."

3. The basic holding of *Crimmins* and cases that have followed its lead is that exclusion of the juris-

dictional element from the requirement of knowledge results in an expansion of the scope of the illicit agreement beyond the terms the conspirators had envisioned (see *Crimmins*, *supra*, 123 F. 2d at 273). But this conclusion is contrary to the law of conspiracy as it has developed in this Court. In *Blumenthal* v. *United States*, 332 U.S. 539, 557, the Court noted that a conviction for a conspiracy may rest solely upon a showing of understanding of the general plan, "without requiring evidence of knowledge of all its details or of the participation of others." In upholding a conviction for conspiring to restrain interstate trade and commerce, this Court stated in *United States* v. *Patten*, 226 U.S. 525, 543:

> And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for * * * by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result.

The proof in this case established that respondent was a member of a conspiratorial agreement to assault or rob certain persons in order to obtain $17,000. He intentionally adopted a course of conduct designed to bring about that result. In so doing, he intentionally violated the law "in the only sense in which the law ever considers intent." *Ellis* v. *United States*, 206 U.S. 246, 257. This intent to engage in a specific course of unlawful conduct, embodied in

an agreement between conspirators and furthered by some overt act, constitutes all of the elements of the common law crime of conspiracy, codified in 18 U.S.C. 371.[12] It misconceives the nature of a conspiratorial agreement to say that a failure to require a showing of knowledge of a jurisdictional element expands the scope of the conspiratorial agreement, because the jurisdictional element does not enhance the criminality of the agreement and is logically no part of the crime itself. *United States* v. *Bolin*, 423 F.2d 834, 836-837 (C.A. 9), certiorari denied, 398 U.S. 954.

Even in *Crimmins* it was suggested that, under circumstances in which conspirators exhibit a "continued indifference" to whether their criminal conduct encompasses the federal jurisdictional element (in that case, whether the stolen bonds had crossed state lines), knowledge of that element may be deemed an "implied term" of the agreement (123 F.2d at 273). This suggestion has been followed in numerous lower court decisions. See *United States* v. *Iacovetti*, 466 F.2d 1147, 1154 (C.A. 5), certiorari denied, 410 U.S. 908; *United States* v. *Garafola*, 471 F.2d 291 (C.A. 6); *United States* v. *Thompson*, 476 F.2d 1196, 1198-1200 (C.A. 7), certiorari denied, 414 U.S. 918; *Nassif* v. *United States*, 370 F.2d 147, 152-153

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[12] The text of the conspiracy statute itself ("If two or more persons conspire * * * to commit any offense against the United States * * *") sheds little light on the question whether the courts should import a requirement of proof of the conspirators' knowledge of the jurisdictional element. Certainly the statute itself contains no such requirement.

(C.A. 8). In *Nassif*, the Eighth Circuit drew this analogy (370 F.2d at 153, n. 9):

> If one agrees to drive through a downtown section of a city at 60 m.p.h. without stopping, one could be guilty of conspiring to run past a traffic light, even though ignorant of such light, because one could reasonably suppose that there is such a light to run past.

In essence, if one agrees to drive recklessly and lawlessly through town, one assumes the risk that one of the traffic lights may be red. Respondent and his co-conspirators exhibited a similar kind of lawlessness and recklessness when they decided to "rip off" the intended purchasers of narcotics. It is not too much to say that they assumed the risk that their victims might turn out to be federal officers.

4. With the exception of the opinion of the Second Circuit in this case, it appears that no lower court has ever faced the *Crimmins* issue in the specific context of a prosecution for conspiracy to violate 18 U.S.C. 111. However, our position that no distinction should exist in the knowledge requirements for conspiracy and for the underlying offense is supported by decisions of this Court and courts of appeals in cases involving the same issue with respect to other federal statutes.

In re Coy, 127 U.S. 731, was a case in which the defendants were charged, under federal law, with conspiring to tamper with election returns in an election involving both state and federal officials. The defendants argued that "as it is consistent with

the indictment that the actions of the conspirators were directed only to the election of * * * [state and local officers], and not to that for the federal office of a congressional representative, the indictment is for that reason insufficient." 127 U.S. at 753. In rejecting this argument, Mr. Justice Miller stated (127 U.S. at 753-754):

> The charge is that the conspirators *unlawfully and feloniously* induced the election officers to omit to perform their duty in this respect, which is in general conceded to be expressive of an evil intent. But counsel demand something more than this general evil intent in tampering with the poll lists, tally papers and certificates, although it is not denied that the object of the parties accused, in inducing the election officers to violate their duty, proceeded from a criminal intent, or that it was done for the purpose of affecting the returns contained in the papers that were withheld, or exposing them to the danger of mutilation and alteration. It is said, however, that since the evil intent is not shown to have been specifically aimed at the returns of the vote for congressmen, the statutes of the United States can have no force so far as the infliction of any penalty is concerned; and it is asserted that Congress had no power to provide for any punishment where no intent affecting the congressional election is averred.
>
> It would be a very singular principle to establish, that, where a man was charged with a homicide, caused by maliciously shooting into a crowd with the purpose of killing some person against whom he bore malice, but with no in-

> tent to injure or kill the individual who was actually struck by the shot, he should be held excused because he did not intend to kill that particular person, and had no malice against him.
>
> * * * * *
>
> The object to be attained by these acts of Congress is to guard against the danger, and the opportunity, of tampering with the election returns, as well as against direct and intentional frauds upon the vote for members of that body. The law is violated whenever the evidences concerning the votes cast for that purpose are exposed or subjected in the hands of improper persons or unauthorized individuals to the opportunity for their falsification, or to the danger of such changes or forgeries as may affect that election, whether they actually do so or not, and whether the purpose of the party guilty of thus wresting them from their proper custody and exposing them to such danger might accomplish this result. [Emphasis in original.]

The Court in *Coy* thus laid down two principles that we rely upon here: (1) where there is an intent to commit an unlawful act, there need not be a showing of a specific "anti-federal" intent unless the statute requires it; and (2) concerted action on the part of the conspirators that encompasses all of the elements necessary to prove the underlying substantive offense is sufficient to prove the conspiracy.

This view has been particularized by the courts of appeals. Thus, for example, in *Wilkerson* v. *United States*, 41 F. 2d 654, certiorari denied, 282 U.S. 894, the Seventh Circuit reviewed a conviction for

conspiracy to receive stolen automobiles that were moving as interstate commerce, in violation of 18 U.S.C. (1940 ed.) 408 (now 18 U.S.C. 2313). After noting that the statute defining the substantive offense did not require that the defendant know that the stolen property was a part of interstate commerce, the court concluded (41 F. 2d at 656):

> The conspiracy statute under which this indictment is drawn provides that if two or more persons conspire to commit *any offense* against the United States and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to the conspiracy shall be fined or imprisoned, etc. How, then, can it be said that it is necessary, under the conspiracy statute, to prove knowledge of the appellant as to the interstate character of the property, when it is not necessary to do so in order to warrant a conviction under the statute which defines the substantive crime? [Emphasis in original.] [13]

In *Nelson* v. *United States*, *supra*, 415 F.2d 483, certiorari denied, 396 U.S. 1060, the Fifth Circuit utilized the same reasoning in upholding a conviction for conspiring to violate 18 U.S.C. 2113(c) (receiv-

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[13] Although the court in *Wilkerson* found that the resolution of that issue was not required for the disposition of the case, the Seventh Circuit has since expressly held that proof of a defendant's knowledge of a "jurisdictional element" is not required in a conspiracy prosecution. *United States* v. *Polesti*, 489 F. 2d 822, 824 (C.A. 7), petition for a writ of certiorari pending, No. 73-5489.

ing property, knowing it to have been stolen from a federally insured bank).[14]

CONCLUSION

Under traditional concepts of the common law crime of conspiracy, an agreement that encompasses all of the elements necessary for prosecution of the underlying substantive offense thereby also possesses the requisite attributes of a conspiracy in violation of the general federal conspiracy statute, 18 U.S.C. 371, including the element of criminal intent. In adopting and perpetuating a contrary rule, the Second Circuit in *Crimmins* and in its decision in this case was misled by a seductive, but faulty, analogy into requiring a different and greater showing of knowledge in a conspiracy case than in a prosecution of the underlying substantive offense. There is no basis in law or reason for this distinction, and the *Crimmins* doctrine should be rejected. Accordingly, the judgment of the court of appeals in this case should be reversed.

[14] *Pettibone* v. *United States*, 148 U.S. 197, does not support a contrary conclusion. There, defendants were indicted for conspiring to intimidate employees of a certain company into striking while a federal court injunction was in effect prohibiting such action on their part. The indictment did not allege that the defendants had knowledge of the injunction, nor that it was the purpose of the conspiracy to violate the injunction. *Id.* at 203-204. From that set of facts, the Court concluded that the defendants could not be convicted of conspiring to violate a federal law prohibiting the obstruction of justice since it did not appear that they knew or had notice that "justice was being administered in such court." *Id.* at 206. An important aspect of this case, which supports our position, is that the Court first looked to determine what constituted the *substantive* offense of obstruction of justice. Having determined that the indictment failed to show that defendants' actions were a violation of the substantive offense, it logically followed that they could not be guilty of conspiring to commit such an offense.

Respectfully submitted.

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